Supreme Court, U.S.
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No. 95-388

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
*Petitioners,*
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

### STATEMENT

The central issue before the Court is whether the Sherman Act ceases to apply to salary-fixing restraints unilaterally imposed by a group of employers on a previously competitive labor market simply because the employees have exercised their right to engage in collective bargaining. Respondents and their army of *amici* have generated considerable flak, but their counterattacks have both missed the essential issue and skirted entirely the compelling facts underlying petitioners' antitrust claim.

The labor market involved in this case is a competitive market restrained by a classic monopsony. By virtue of their total control over the production and marketing of major professional football in the United States,[1] the NFL clubs are the only available purchasers of the uniquely valuable services of top-level professional football players —services for which the clubs are admittedly direct business competitors, J.A. 58, 74. If respondents collude to eliminate interclub competition in this labor market, they can exploit their monopsony power at the expense of the players, producing a misallocation of economic resources and inevitably diminishing the quality of the football product—the economic equivalent of a price increase for fans.[2]

The salary-fixing scheme imposed by respondents in 1989 was precisely such an anticompetitive monopsonistic restraint. This complete elimination of competition among

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[1] J.A. 35. In 1986, a jury found that "the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States." *United States Football League v. NFL*, 842 F.2d 1335, 1341 (2d Cir. 1988).

[2] *See* Pet. App. 39a-41a (Wald, J., dissenting); Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 42-43, 72 (1993); Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 1.2, at 17-18 (1985); Richard A. Posner & Frank H. Easterbrook, *Antitrust* 150 (1981).

the clubs drastically slashed the salaries of petitioners to one-fifth the market value of their services in 1989. The NFL owners pocketed the difference, amounting to more than $10 million. The clear aim of the clubs' collusive enforcement of Resolution G-2's fixed salary was to suppress competitive bidding among clubs for the services of developmental squad players.[3]

In defense of carte blanche antitrust immunity for such anticompetitive employer collusion, the NFL clubs and their *amici* have advanced an assortment of fallacies, false alarms and hyperbole.

First, they insist that the National Labor Relations Act displaces all federal and state laws that might otherwise constrain unilateral employer conduct throughout the sphere of collective bargaining. That absolutist position, however, has repeatedly been rejected in this Court's recent labor preemption decisions and cannot be squared with the Court's nonstatutory exemption precedents.

Next, respondents and their *amici* vociferously assert that antitrust review for salary restraints unilaterally imposed by the NFL clubs will decimate multi-employer bargaining in all industries across the United States. That contention is preposterous and demonstrably false. Outside the relatively narrow fields of sports and entertainment, other industries with multi-employer bargaining typically have *no competitive labor markets* and employers lack the monopsony power enjoyed by the NFL clubs. In total contrast to athletes and other talented performers whose individual services command higher value in a competitive market, employees in more conventional industries acting through their unions have accepted the standardization of employment terms precisely because competition in these

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[3] The $1,000 per week salary fix was manifestly not imposed to address the "stashing" of players. Resp. Br. 4. Any possibility that valuable players might be "stashed" on developmental squads was eliminated by Resolution G-2's stipulation that no player could be signed to a developmental squad without first being made available to other clubs through the waivers process.

industries would drive wages and other labor costs *down*, not *up*. Those employees would have no incentive to bring the sort of antitrust actions that have arisen in professional sports, and because the employees themselves have foreclosed the possibility of individual bargaining, such hypothetical actions could not state a claim for antitrust liability.

Indeed, the NFL clubs and their *amici* frankly concede that employees in other industries have "no 'competition' interest of the kind asserted by petitioners," Resp. Br. 17.[4] For the very reasons conceded by respondents, it is not at all surprising then that for decades the lower courts in fact applied the limited consent-based labor exemption advocated by petitioners without producing any effects whatsoever on multi-employer bargaining in industries other than professional sports.

Moreover, antitrust review of employer conduct in professional sports and similar industries does not threaten multi-employer bargaining. Respondents' arguments to the contrary are based on the fallacious premise that antitrust review would automatically render illegal any and all concerted action by an employer association. That argument is a bugbear that reveals a basic misunderstanding of substantive antitrust law, which tolerates a broad range of joint conduct.

Finally, in an unabashed effort to avoid the flawed reasoning of the majority below (particularly the stark and

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[4] *See also* Opp. to Pet. for Cert. 24, 25 ("the question presented has not arisen outside professional sports," and "there is no reason to assume" the Court's decision "will have a material impact on collective bargaining in any market" since "the professional sports industry has . . . very different economic imperatives than other industries") (internal quotation marks omitted); Brief for Associated General Contractors as *Amicus Curiae* (hereinafter "Associated General Contractors Br.") 9 ("The economic structure and nature of collective bargaining in the professional sports and entertainment industries differ from th[e] typical pattern in fundamental respects."); *id.* at 9-10, 16.

perverse inequality it creates between employees who opt for collective bargaining and those who do not), respondents resort to an even more radical claim: that the Sherman Act can never reach restraints on competition in any labor market, even where there is no collective bargaining and thus no purported conflict with the NLRA. That claim is an old rusty favorite of respondents that was dismissed by this Court as "lacking in merit" nearly 40 years ago in *Radovich v. NFL*, 352 U.S. 445, 454 (1957), and that has been thoroughly repudiated by every court to hear it since.

In sum, there is no clear conflict between the Sherman Act and the NLRA that supports the broad exemption crafted by the majority below. The labor law interest in collective bargaining does not require immunity for a fixed salary imposed by employers in lieu of a bargaining agreement in industries where salaries have been individually negotiated. Blanket antitrust immunity for employer associations would not preserve and enhance multi-employer bargaining in such industries. The freedom given to employer groups to engage in the sort of salary fixing exhibited here would, in fact, result in less collective bargaining and inevitably foster union decertifications and a disruptive cycle of labor strife anathema to the core purposes of the NLRA.

## ARGUMENT

### I. THE NLRA DOES NOT OVERRIDE ALL OTHER LAWS THAT MAY APPLY TO COLLECTIVE BARGAINING RELATIONSHIPS, AND IN PARTICULAR THE IMPASSE DOCTRINE DOES NOT GIVE EMPLOYERS CARTE BLANCHE TO IMPOSE TERMS OF EMPLOYMENT THAT ARE OTHERWISE ILLEGAL.

Respondents proclaim that the collective bargaining process is "the *exclusive* means of determining terms and conditions of employment in unionized industries" and that the NLRA impliedly requires "the complete exclusion

of the government, including antitrust courts, from any substantive role in the bargaining process." Resp. Br. 8 (emphasis in original); *see id.* at 10, 11-15, 29. *See also* Brief for Chamber of Commerce, *et al.*, as *Amici Curiae* (hereinafter "Chamber Br.") 8-9, 13.

That claim blithely ignores the most basic teachings of this Court's nonstatutory labor exemption precedents, which establish that parties retain their rights under both the antitrust and labor laws. *See Connell Construction Co. v. Plumbers & Steamfitters Local No. 100,* 421 U.S. 616, 634 (1975). Indeed, even the terms of a collective bargaining agreement concerning "a compulsory subject of bargaining" under the NLRA are not "automatically exempt from Sherman Act scrutiny." *United Mine Workers v. Pennington,* 381 U.S. 657, 664 (1965).

The sweeping proposition propounded by respondents, moreover, has been definitively rejected by this Court in *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987), and *Livadas v. Bradshaw,* 114 S. Ct. 2068 (1994). These recent implied preemption decisions make it perfectly clear that the parties to a collective bargaining relationship are not relegated to a lawless arena where they must claw and fight just to win back legal protections generally available to nonunion employers and employees. Congress, in other words, never intended the NLRA to displace the "backdrop" of other generally applicable state and federal laws that apply equally to union and nonunion employment relationships. *Livadas,* 114 S. Ct. at 2081-82; *Fort Halifax,* 482 U.S. at 21; *Metropolitan Life* 471 U.S. at 757. Antitrust law is plainly part of that backdrop, as the Court held in *Radovich* and *Anderson v. Shipowners' Ass'n,* 272 U.S. 359 (1926), and as Congress affirmed during the legislative debates underlying the Norris-LaGuardia Act, *see* Pet. Br. 38-39—legislative history respondents never even mention.

In arguing for total nonintervention, respondents confuse two distinct lines of decision. First, they cite deci-

sions like *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960), and *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), *e.g.*, Resp. Br. 14, which hold that the NLRB is without statutory authority to impose employment terms and conditions on the parties or to "control the results of negotiations," 361 U.S. at 488. *See* 397 U.S. at 108. Those decisions speak to the procedural rather than substantive focus of the NLRA itself, not to the compatibility of collective bargaining with other background laws—the issue presently before the Court.

Second, they rely on *Machinists v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132 (1976), and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), to argue that all forms of economic self-help permitted under the labor laws, including unilateral implementation, must remain entirely free from any governmental regulation. Resp. Br. 40; Chamber Br. 12-13. But *Machinists* preemption is too narrow to support respondents' claim of immunity. These decisions hold only that the NLRA impliedly preempts state and local efforts to intercede in a specific labor dispute in a way that "directly regulate[s]" the parties' bargaining activity or that seeks "directly to force a party to forgo the use of one of its economic weapons." *Fort Halifax*, 482 U.S. at 20 (distinguishing *Machinists* and *Golden State*, both of which involved specific government action taken to handcuff an employer's or union's resort to economic weapons in a particular labor dispute). The Sherman Act is a federal statute with none of the hallmarks of such targeted, preferential intervention; rather, it is a generally applicable law that protects against unreasonable restraints of trade throughout the economy, without distinguishing between union and nonunion labor markets. *See* 482 U.S. at 20-21.

In *Fort Halifax*, the Court heard and rejected the identical argument now advanced by the NFL clubs and their *amici* concerning the supposed inviolability of the employers' resort to unilateral implementation. The Maine severance pay law at issue in *Fort Halifax* allowed employers

and employees to bargain for whatever severance pay they might choose, but in the absence of a bargaining agreement and in the event of impasse, the law prohibited employers from unilaterally providing less than the required amount of severance pay. Respondents' *amicus* the Chamber of Commerce argued in *Fort Halifax*, just as it does here, that such a requirement was preempted by the NLRA because it interfered with the "protected right of unilateral implementation" by depriving the employer of its "ability to further its bargaining position by implementing unilaterally its last, best offer." [5]

The Court disagreed that the Maine law "intrude[d] on the bargaining activities of the parties" or "undercu[t] an employer's ability to withstand a union's demand for severance pay." 482 U.S. at 20. "[I]f impasse is reached," the Court concluded, "the employer may rely on pre-existing state [common] law to justify its authority to make employment decisions," and upon impasse, "pre-existing state law [likewise] determines the right of employees to a certain level of severance pay and the duty of the employer to provide it." *Id.* at 21. *Fort Halifax* thus expressly confirms that the employer's ability to impose unilateral terms at impasse is a common law right fully subject to the ordinary application of the legal "backdrop." *Ibid.* It is perhaps no surprise then that respondents and their *amici* relegate *Fort Halifax* to passing references in footnotes, since they have no persuasive response to it. *See* Resp. Br. 42 n.29; Chamber Br. 14 n.5.[6]

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[5] Brief for Chamber of Commerce as *Amicus Curiae* in *Fort Halifax Packing Co. v. Coyne*, No. 86-341 (Oct. Term 1986), pp. 18-19 (reprinted in the appendix hereto at pages 3a-4a.)

[6] The Court in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) ("*Golden State II*"), did not hold that the NLRA grants the employer a federal right of unilateral implementation. *Golden State II* simply held that "the interest in being free of governmental regulation," to the extent such an interest is implied in the NLRA under the *Machinists* preemption doctrine, is a federal statutory right enforceable against state governments under § 1983. 493 U.S. at 112.

It is no answer to *Fort Halifax* to argue that employers must be able to impose restraints that would otherwise violate the Sherman Act in order to pressure employees to reach a bargaining agreement. Employers could even more effectively pressure employees and further their bargaining objectives upon impasse if they could unilaterally relax occupational health and safety requirements, single out particular racial groups for pay cuts, lay off the most senior employees, or reduce vested retirement benefits. But no one could reasonably maintain that the employer's interest in unilateral implementation trumps OSHA or the federal anti-discrimination and pension laws. *Metropolitan Life*, 471 U.S. at 755. Among other things, such a result would destroy the NLRA's basic premise that all employees have a free and equal right to organize for collective bargaining without thereby forfeiting legal protections they would otherwise enjoy. 29 U.S.C. § 157; *see Livadas*, 114 S. Ct. at 2075. Yet that is unavoidably where respondents' logic leads.

## II. THE NONSTATUTORY EXEMPTION DOES NOT IMMUNIZE FROM ANTITRUST REVIEW RESTRAINTS ON TERMS OF EMPLOYMENT UNILATERALLY IMPOSED BY EMPLOYER CARTELS.

In achieving the required harmonization of labor and antitrust law, the guiding rule is that the Sherman Act presumptively applies except to the extent there is a clear conflict with the NLRA and its collective bargaining scheme. *See* Pet. Br. 16-17. *Accord Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, ——, slip op. at 13 (1996) ("implied repeals" require " 'irreconcilable conflict' between the two federal statutes at issue"). Under the proper application of that rule, the nonstatutory exemption immunizes restraints on terms and conditions of employment only insofar as management and labor have mutually consented to those restraints through a collective bargaining agreement. In opposing that view, respondents offer only speculative predictions that have no grounding either in law or fact.

### A. Antitrust Review of Respondents' Unilaterally Imposed Salary Restraint Will Not Impede Multi-Employer Bargaining.

The NFL clubs and their *amici* predict that without automatic blanket antitrust immunity for employer associations, multi-employer bargaining in American industry will cease to exist.[7] This is crying wolf.

First, these speculations ignore completely the critical, controlling distinctions outlined earlier, *see supra* pp. 1-3, between the labor markets in professional sports and entertainment and those in more conventional industries characterized by multi-employer bargaining (including the industries represented by most of respondents' *amici*). The traditional trade unions in those other industries—in clear contrast to the Players Association in football—*are* organized "to eliminate competition in the labor market." Chamber Br. 10 (internal quotation marks omitted). Labor organizations in those industries insist on standardized wages and other terms of employment and do not delegate to individual employees the right to bargain their own contracts, since the employees stand to lose if their individual wages and other benefits are subject to competition.

Accordingly, when employer associations in such industries unilaterally implement a proposed change in terms, they are simply exchanging one set of standardized employment terms for another. As much as the employees may dislike a particular term imposed by employers, they themselves have chosen standardization over competition, and thus have no incentive (or basis) to file an antitrust challenge, as respondents appear to recognize. *See* Resp.

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[7] *See* Resp. Br. 44; Chamber Br. 9; Brief for National Elec. Contractors Ass'n as *Amicus Curiae* 17; Brief for Bituminous Coal Operators' Ass'n, *et al.*, as *Amici Curiae* 18.

Br. 17 ("In other industries, . . . an *antitrust* challenge to a unilaterally implemented wage scale would [be] almost unthinkable," since "[i]n those industries, no 'competition' interest of the kind asserted by petitioners exists") (emphasis in original). If such employees were inclined to file antitrust suits, they would have no realistic prospect for success, since they could not assert any interest in competition under the antitrust laws.[8]

In professional sports, in contrast, players' salaries had always been subject to individual negotiation prior to respondents' salary-fixing restraint, and the Players Association here specifically told the League that "no fixed wage for any group of players is acceptable to the NFLPA." J.A. 23. This case presents the best possible example of a unilateral multi-employer restraint that "contravenes antitrust policies to a degree not justified by congressional labor policy." *Connell*, 421 U.S. at 625.[9]

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[8] Where the employees have agreed to a standardized, noncompetitive labor market, the employers' unilateral implementation of terms would not "contraven[e] antitrust policies." *Connell*, 421 U.S. at 625. Employees attempting to challenge such unilateral implementation would lack antitrust standing, since their injury would not stem from a harm to competition. *See Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 545-46 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Finally, an antitrust challenge to a unilateral restraint may simply fail under the rule of reason where the employers in the industry lack the sort of monopsony power possessed by the NFL clubs.

[9] Respondents incorrectly contend that the NLRA, not the antitrust laws, is "the source of the competition interest asserted by petitioners." Resp. Br. 15; *see id.* at 15-18. The existence of individual bargaining rights for employees does *not* require employer consent secured through collective bargaining. As the players' chosen bargaining representative, only the Players Association has the prerogative to delegate bargaining authority to

Second, the speculations of respondents and their *amici* are convincingly disproven by history. For more than three decades, from *Radovich* to *Powell v. NFL*, the lower courts consistently applied antitrust review to restraints unilaterally imposed by clubs in the various professional sports leagues (other than baseball). *See* Brief for NHL Players Ass'n, *et al.*, as *Amici Curiae* 4-18. Notwithstanding the accepted application of antitrust in the sports world for many years, multi-employer bargaining in other industries was never affected or threatened. None of respondents' *amici* has suggested, nor could they, that the consent-based standard articulated 20 years ago in *Mackey v. NFL* ever prevented or impeded or even mildly disrupted the bargaining activity of employer associations in their industries.[10]

Finally, even in those industries like sports and entertainment where employees do have potential antitrust claims (because of the existence of individual bargaining), predictions that multi-employer bargaining will be destroyed ring false, since they are based on the erroneous

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the individual players. *See, e.g., Collins v. National Basketball Players Ass'n*, 850 F. Supp. 1468, 1475 (D. Colo. 1991), *aff'd*, 976 F.2d 740 (10th Cir. 1992); *Morio v. North Am. Soccer League*, 501 F. Supp. 633, 640 (S.D.N.Y.), *aff'd*, 632 F.2d 217 (2d Cir. 1980). *See also Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1222 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1053 (1991). The Court has long recognized that individual bargaining is appropriate under the NLRA in industries like football, where employee talents are highly differentiated. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 336 (1944). The Sherman Act protects all such competition, regardless of how the market is created.

[10] Respondents once again pretend that "every court of appeals" has rejected a consent-based exemption. Resp. Br. 18. We have previously disposed of that misrepresentation. Reply to Opp. to Cert. 3, 4-5. *See Mackey v. NFL*, 543 F.2d 606, 612 (8th Cir. 1976) ("To determine the applicability of the nonstatutory exemption *we must first decide* whether there has been any *agreement* between the [union and the employers] concerning the [restraint at issue].") (emphasis added), *cert. dismissed*, 434 U.S. 801 (1977); *id.* at 614, 623.

premise that antitrust law will not tolerate any collective activity whatsoever by an employer bargaining unit. *See* Resp. Br. 44-45. That premise is disproven by the fact that multi-employer bargaining has continued in both professional sports and entertainment notwithstanding numerous lower court decisions applying the rule that we propose. The reason is that antitrust review of employer-imposed restraints on employment terms still allows each employer to implement its preferred terms; allows employer associations as a group to implement any number of employment restraints that are reasonable under the Sherman Act; does not condemn the formulation or presentation of bargaining positions or any other bargaining activity by employers; and does not impose any particular terms on the parties.[11]

Moreover, it is likely that many employer restraints, including those imposed by the NFL clubs, will be analyzed under the flexible rule of reason standard. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 8 (1979). Many challenged restraints will pass that test.[12]

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[11] The NFL clubs and *amici* warn that members of employer associations will be held liable for treble damages on a theory of "conscious parallelism" simply for attending bargaining meetings together and choosing to implement the same or similar terms if impasse is reached. *See* Resp. Br. 44-45; Brief for American Trucking Ass'ns as *Amicus Curiae* (hereinafter "American Trucking Br.") 24-25; Associated General Contractors Br. 23. Such evidence alone, however, is not enough to establish a Sherman Act § 1 violation. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Section 1 requires proof of "a conscious commitment to a common scheme designed to achieve an unlawful objective" based on "evidence that tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Nor could employers be held liable for individually implementing after impasse terms the employers had formulated jointly prior to impasse, provided they implement such terms independently.

[12] *See, e.g., Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Molinas v. National Basketball Ass'n*, 190 F. Supp.

In truth, experience powerfully demonstrates that it is the Court of Appeals' blanket antitrust exemption that would prove fundamentally disruptive to multi-employer bargaining in sports. If forced to choose between collective bargaining and the pursuit of their antitrust rights, players in the various leagues will choose to cease collective bargaining and to decertify their associations, as the NFL players have done, whenever necessary to challenge unreasonable anticompetitive restraints that the leagues would be emboldened to impose.[13]

### B. Labor-Management Agreement Is the Touchstone for Antitrust Immunity for Restraints on Employment Terms.

The NFL clubs' unilateral imposition of a salary-fixing scheme foreclosing competition for developmental squad players presents the clearest possible case for denying the protections of the nonstatutory labor exemption. Antitrust review of such restraints is appropriate in the absence of employee consent expressed in a collective bargaining agreement. When management unilaterally imposes new or different terms and conditions on employees, those substantive terms are not the collective product of the parties' bargaining but are the product of the employers' own business interests in the exercise of their common law rights. *Fort Halifax*, 482 U.S. at 21.[14] There is

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241 (S.D.N.Y. 1961). As held by the District Court, respondents' salary-fixing restraint is subject to the rule of reason because of the joint venture nature of the NFL. Although *amici* speculate that the NFL may be a "single entity" for purposes of § 1, Chamber Br. 7 & n.3, respondents abandoned any such claim on appeal below. *See* J.A. 137-39.

[13] If, as respondents speculate, antitrust scrutiny ever became an impediment to multi-employer bargaining in sports or any other industry, "the orderly way to eliminate [such problems] is by legislation and not by court decision," since "[c]ongressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation." *Radovich*, 352 U.S. at 452.

[14] Although impasse may not be permanent, it is a crucial stage in the bargaining process when "the parties have exhausted the

thus no intrusion on the NLRA's bargaining process to subject restraints implemented unilaterally by employers to the legal requirements that would normally apply, including antitrust. *Ibid.* To hold otherwise would convert an implied exemption meant to foster constructive collective bargaining relationships into a blanket license for employers to circumvent the ordinary constraints of antitrust law indefinitely for their own ends. *See United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).[15]

Since this case involves only the availability of the labor exemption for concerted employer imposition of a salary term that restrained a competitive labor market, the Court need not decide here the extent to which lockouts or any other tactical employer conduct may be exempt, as we suggested earlier. Pet. Br. 40-41. Distinguishing unilateral implementation of terms from lockouts is consistent with the Court's holding in *Fort Halifax* that background laws (like the Sherman Act) apply to terms unilaterally implemented upon impasse because such application creates no conflict with the NLRA.[16] The imposition of terms is

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prospects of concluding an agreement and further discussions would be fruitless." *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 & n.5 (1988) (internal quotation marks omitted). At impasse, the employer may implement changes in employment terms without the agreement of the employees' bargaining representative, just as any employer may do in the absence of a collective bargaining relationship.

[15] Certain *amici* suggest that employers are entitled to blanket antitrust immunity simply "by virtue of th[e] union's voluntary decision to select the multi-employer bargaining form." Chamber Br. 25. But that suggestion wrongly assumes that all anticompetitive restraints the employers may impose are "absolutely essential" to such bargaining. *Ibid.* It also assumes that by agreeing to multi-employer bargaining, the employees have implicitly surrendered their right to challenge such collusive restraints—a proposition that, if accepted, would surely chill the practice of multi-employer bargaining.

[16] The NLRB too has recognized important distinctions between unilateral implementation and lockouts. For example, employers

never purely tactical; the terms imposed always serve the employer's business interests and are always, at least potentially, a permanent substitute for a bargaining agreement.[17]

Here, of course, respondents' imposition of the fixed-salary restraint was not at all tactical. It was the culmination of the owners' decision to amend the NFL Constitution to restrain themselves from engaging in salary negotiations with developmental squad players and to provide a means to seize the payroll savings they desired. Before respondents ever met with the players' bargaining representatives, they agreed among themselves on the fixed salary that would be paid to all developmental squad players, J.A. 62, and after one short meeting, respondents declared impasse "[f]or implementation purposes." *Id.* at 19-20. This assault on competition in the market for the services of professional football players certainly cannot claim any special position in the bargaining scheme established by the NLRA and does not require protection under the implied labor exemption.[18]

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may lawfully lock out employees but cannot unilaterally implement terms prior to impasse. The NLRB has justified this distinction on the ground that a lockout is properly employed as an economic weapon to affect or respond to the negotiation process, whereas unilateral implementation (while seemingly less drastic) forecloses negotiation. *See Daily News of Los Angeles*, 315 N.L.R.B. 1236, 1243 (1994), *enf'd*, 73 F.3d 406 (D.C. Cir. 1996).

[17] The NLRB has certainly never said otherwise. Respondents and their *amici* heavily rely upon *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enf. denied*, 500 F.2d 181 (5th Cir. 1974), but there the NLRB observed only that impasse need not be permanent and that actions taken upon impasse may sometimes break a stalemate.

[18] Because the exemption for employment terms that restrain a competitive labor market is properly limited to those terms incorporated into bargaining agreements, any immunity for such restraints should end when the agreement has expired and the employees have notified the employers they no longer consent to the restraint. *See* Pet. Br. 45-47; *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991). Such termination of the exemption would

## III. ANTITRUST LAW FULLY APPLIES TO EMPLOYER RESTRAINTS ON COMPETITION IN LABOR MARKETS, AS EVERY COURT TO ADDRESS THE ISSUE HAS HELD.

Finally, respondents attempt an end run around the nonstatutory labor exemption (and hence the question on which the Court granted certiorari). The NFL clubs claim that regardless of any purported conflict with labor law, the Sherman Act can never apply to any collusive restraint on competition in an input market for labor, unless the restraint also directly harms competition in an output or "product" market. Resp. Br. 18-26. It is a powerful indictment of the panel majority's reasoning that respondents would stretch to defend the judgment below on the basis of an alternative theory unanimously rejected by the Court of Appeals, *see* Pet. App. 24a (majority), 35a-41a (dissent), and disclaimed even now by respondents' own *amici*.[19] One virtue of the argument from respondents' point of view, of course, is that it avoids any need to justify the majority's startling conclusion that employees who "seek the protections of the Sherman Act" must "forego unionization or . . . decertify their unions." Pet. App. 30a—something the football players have already had to do. But in substance it is an audacious claim completely lacking in merit and one thoroughly discredited in the courts and by leading antitrust scholars.

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not implicitly overrule *NLRB v. Katz*, 369 U.S. 736 (1962). *See* Chamber Br. 27-28. The NLRB has never held that employers violate the *Katz* impasse doctrine by unilaterally altering terms the employees, through their bargaining representative, have declared they no longer wish to maintain. In any event, impasse is the latest possible point for terminating the exemption, and the Court should emphatically reject the rule of never-ending immunity adopted in *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

[19] *See* American Trucking Br. 29 n.12 (where the nonstatutory labor exemption is inapplicable, "the Sherman Act remains in full force"); Chamber Br. 25 ("Any claim to a[n antitrust] exemption would evaporate if the union chose not to bargain [collectively].").

This Court has long held that antitrust law fully applies to competition in markets for the services of individuals. *E.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) ("The sale of services" is "specifically included . . . within § 1.") (citing *Radovich*). *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). The Court has also made it clear the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers," but protects *all* participants in competitive markets "who are made victims of the forbidden practices." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)); *see Radovich*, 352 U.S. at 454. Respondents' radically narrow construction of the antitrust laws runs hard against the current of these prior decisions.

Significantly, the NFL and several of the respondent clubs made the same argument to this Court 40 years ago in *Radovich*, and the Court rejected it. Relying heavily on the tenuous authority offered here—the cryptic preamble sentence to § 6 of the Clayton Act, 15 U.S.C. § 17,[20] and dicta in *Apex Hosiery Co. v. Leader*, 310

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[20] Section 6, like other provisions of the so-called statutory labor exemption, protects only the unilateral conduct of *employee* organizations. Thus, "a party seeking refuge in the statutory exemption must be a bona fide labor organization." *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 717 n.20 (1981). *See id.* at 717 n.21 ("employers . . . are plainly a 'non-labor group' "); *Connell Construction*, 421 U.S. at 621-22; *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). Far from "plain language" supporting respondents, Resp. Br. 22, the single preamble sentence of § 6 is fully consistent with this narrow interpretation, *see Mackey v. NFL*, 543 F.2d at 617-18; *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970), and the statute's legislative history confirms that Congress intended no more. *See* Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617, 641-46.

U.S. 469 (1940)[21]—respondents argued in *Radovich* that controversies between employees and employers concerning "restraints [on] employee services" (there, the reserve clause in NFL player contracts) are "exemp[t] . . . from the operation of the Sherman Act." Brief for Respondents in *Radovich v. NFL*, No. 56-94 (Oct. Term 1956), p. 61 (reprinted in the appendix hereto at page 9a). The Court summarily turned away that contention as "lacking in merit." 352 U.S. at 454.

In an effort to distinguish *Radovich*, respondents argue that since the reserve clause at issue there restrained players from, among other things, working for a competing league, "there can be no doubt" the Court's holding turned on the presence of "adverse effects on the product market." Resp. Br. 25. In *Radovich* itself, however, the NFL made precisely the opposite assertion,[22] and nothing in the Court's discussion of Radovich's antitrust claim addressed any effects of the challenged restraint beyond its effects in the labor market of the NFL. *See* 352 U.S. at 453-54. The Court, furthermore, held that it would "not add requirements to burden the private [antitrust] litigant beyond what is specifically set forth by Congress." Id. at 454.[23]

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[21] *Apex Hosiery*, which stemmed from a sit-down strike by employees, held only that "restraints on the *sale* of the employee's services to the employer, however much they curtail the competition among *employees*, are not in themselves" violations of the Sherman Act. 310 U.S. at 502-03 (emphasis added). The Court did not hold that unilateral restraints on commercial competition among *employers* for the *purchase* of employee services are beyond the reach of the Act.

[22] *See* NFL Br. in *Radovich* 59 (app. 8a) ("Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.").

[23] It would be curious, moreover, if the NFL clubs now had a free hand to engage in collusive restraints that financially injure players simply because the NFL since *Radovich* has unlawfully

Respondents cite language in *Apex* suggesting that the Sherman Act cares only about restraints that tend to restrict production, raise prices or otherwise harm consumers. Resp. Br. 19-20; *see* 310 U.S. at 493. But even if so, monopsonistic collusion like respondents' salary-fixing scheme is condemned under the antitrust laws precisely because it *will* eventually harm consumers by restricting production of valuable inputs and degrading the quality of the ultimate product. *See Mandeville Island Farms*, 334 U.S. at 240-43.[24]

In the decades since *Radovich*, the NFL clubs (and assorted other professional sports leagues and employers) have repeatedly peddled the labor market/product market distinction to numerous courts, all of which have turned it down.[25] The nation's leading antitrust authorities, too, have rejected respondents' radically limited interpretation of the antitrust laws. *E.g.*, 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377c (rev. ed. 1995):

> "Antitrust law addresses employer conspiracies controlling employment terms precisely because they

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monopolized the market for professional football through the elimination of all competing leagues. *See supra* note 1.

[24] *See also supra* note 2. Contrary to respondents' assertions, petitioners have never conceded that respondents' collusion would have no effect on the NFL's football product and thus on consumers. Counsel for petitioners stated to the court below only what is obvious—that it is specious to claim the clubs' $1,000 per week salary-fixing arrangement had *"improved"* the quality of football. Pet. App. 30a n.8 (emphasis added).

[25] *See Powell v. NFL*, 930 F.2d at 1298-99 & n.4; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d at 616-18 (discussing cases); Pet. App. 37a-38a (Wald, J., dissenting). Indeed, the lower courts have consistently recognized that restraints operating exclusively in labor markets are within the reach of the antitrust laws. *E.g., Gardella v. Chandler*, 172 F.2d 402, 407-08 (2d Cir. 1949) (L. Hand, J., concurring); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995). *See also Law v. NCAA*, 902 F. Supp. 1394, 1402, 1405 & n.11 (D. Kan. 1995) (holding that collegiate athletic association rule fixing salaries for coaches violates § 1).

> tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint." [26]

Respondents simply rehash tired arguments that provide no basis for the Court to repudiate this consensus of authority or jettison so many of its prior holdings.

## CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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March 1996

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[26] While holding in *Associated Gen. Contractors* that a labor organization itself may not have antitrust standing to challenge an employer's labor market restraint, the Court confirmed that those persons who are "market participant[s]" and "direct victim[s]" of the restraint certainly *would* "have a right to maintain their own [Sherman Act] actions." 459 U.S. at 541.

# APPENDICES

# APPENDICES

**APPENDIX A**

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

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FORT HALIFAX PACKING COMPANY, INC.,
*Appellant,*

*—against—*

P. DANIEL COYNE, Director, Bureau of Labor Standards, Department of Labor,
*Appellee.*

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**On Appeal from the Maine Supreme Judicial Court**

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**BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT**

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[page 17]

**B. The Maine Severance Pay Law Is Preempted Under the "Free Play" Doctrine.**

**1. The Severance Pay Law Impermissibly Intrudes Into the Bargaining Process.**

The process of collective bargaining is the primary concern of the NLRA. *Metropolitan*, 105 S.Ct. at 2395, 2396. *See also New York Telephone Company* v. *New York State Department of Labor*, 440 U.S. at 551 (Powell, J., dissenting). As envisioned by Congress, bargaining must occur in an atmosphere of equality. *Metropolitan*, 105 S.Ct. at 2395; *Golden State Transit Corporation* v. *City of Los Angeles*, 106 S.Ct. at 1400. A state cannot " 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Machinists*, 427 U.S. at 147.

The Maine Severance Pay Law prevents the process of collective bargaining from operating with the balance and equality decreed by Congress. Severance pay is a mandatory subject of bargaining. *See NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678, n.15 (1981). Indeed, in negotiations triggered by an employer's decision to terminate or relocate its operation, severance pay is often the crucial issue. The union typically proposes a high amount of severance; the employer counters with a lower amount or even zero. In the framework of unfettered collective bargaining under the NLRA, each party is then free to wrest concessions in exchange for its agreement to the other's proposal, to insist on its own proposal, or to refuse to agree at all. In the absence of intrusive state regulation, bargaining proceeds as Congress intended: between parties who are equally positioned, are under no compulsion to agree to the other's demands, and are free to use the full panoply of economic weapons at their disposal to achieve voluntary agreement. *Golden State Transit Corporation*

v. *City of Los Angeles*, 106 S.Ct. at 1400; *First National Maintenance Corp.* v. *NLRB*, 452 U.S. at 670.

[page 18] An employer subject to the Maine Severance Pay Law has no equality of bargaining position. The employer comes to the bargaining table needing an express agreement on severance pay to escape the substantial payment otherwise required by the Severance Pay Law. The union has no incentive to enter into such an agreement or to make concessions to achieve its own position on severance pay, since in the absence of an express agreement, severance liability will nevertheless be imposed on the employer. The Severance Pay Law gives the union a bargaining chip which inevitably tilts negotiations on severance pay in favor of the union. The effect is to undo the Congressional decision to send the parties to the bargaining table with equivalent power.

In levying economic consequences on the employer for failing to achieve an express contract, the State is attempting both to aid the party which the State judges to be the weaker and to impose its own solution to the parties' bargaining stand-off. This Court has consistently held that state action which has this effect is preempted. "Even though agreement is sometimes impossible, the government may not step in and become a party to the negotiations." *Golden State Transit*, 106 S.Ct. at 1401. Not even the NLRB, with its broad remedial authority, can compel either party to reach agreement on a mandatory subject or burden one side more than the other for the failure to agree after good faith bargaining. *H.K. Porter and Co.* v. *NLRB*, 397 U.S. 99 (1970). Maine may not attempt to achieve the same result.

**2. The Severance Pay Law Deprives the Employer From Resorting to the Legitimate Weapon of Unilaterally Implementing Its Last, Best Offer on Severance Pay.**

In addition to tipping the balance of power in actual negotiations, the Severance Pay Law interferes with the employer's ability to further its bargaining position by

implementing unilaterally its last, best offer after a bargaining impasse has been reached. Unilateral implementation is a legitimate economic [page 19] weapon under the NLRA, just as is a strike or lock-out. *NLRB* v. *Katz*, 369 U.S. 736 (1962); *Reed & Prince Mfg. Co.* v. *NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). The State may not impede its use any more than it could prohibit peaceful recognitional picketing, *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), a secondary boycott, *Teamsters* v. *Morton*, 337 U.S. 252, or a concerted refusal to work overtime, *Machinists*, 427 U.S. 132. Nor may the State restrict an employer's weapons more than a union's. *Golden State Transit*, 106 S.Ct. at 1401.

Applying the employer's protected right of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement its no severance pay offer. Like other employer self-help measures, the economic pressure generated by unilateral implementation would be an incentive to the union to return to the bargaining table, to curtail its own economic weapons, or to make other concessions.

Yet a Maine employer subject to the Severance Pay Law can wield no economic pressure by unilateral implementation of its severance pay offer. Without an express contract, the employer is subject to severance pay liability. The Severance Pay Law effectively eliminates this federally-sanctioned weapon from the employer's economic arsenal.[13] Under this Court's consistent decisions

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[13] Appellant interprets the Severance Pay Law to permit an employer to establish an express contract for severance pay by unilateral declaration. Jurisdictional Statement at 12. If this view is correct, the Severance Pay Law encourages collective bargaining and operates unequally on unionized and non-unionized employees. A unionized employer may not act unilaterally under the NLRA; a non-unionized employer would have no constraint. A state law that encourages collective bargaining, or that penalizes an employee's right to refrain from union activities, is invalid. *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct. at 2398.

protecting the free use of economic weapons by either [page 20] party to enhance its bargaining position, and rejecting state attempts to limit those economic weapons, the Maine Severance Pay Law is preempted.

**C. The Maine Severance Pay Law is Not Protected under Metropolitan Life Insurance Company v. Massachusetts.**

*Metropolitan Life Insurance Company* v. *Massachusetts*, 105 S.Ct. 2380, does not control this case, except as it affirms that equality of bargaining power is the centerpiece of the NLRA.

The issue in *Metropolitan* was a narrow one: whether a state insurance regulation that does not alter the balance of bargaining is the kind of interference with the goals of federal labor law which is forbidden by the NLRA. The dispositive difference between *Metropolitan* and this case is that the Severance Pay Law indisputably tips the balance of bargaining. Unlike the Massachusetts statute, which leaves the parties free to purchase the benefit or not, *Metropolitan*, 105 S.Ct. at 2394, the Severance Pay Law gives the employer no choice. The failure to negotiate an express contract for severance pay subjects the employer to payment by law. By compelling agreement on a critical bargaining term, Maine has acted more like Los Angeles in *Golden State Transit*, 106 S.Ct. 1395, than like Massachusetts in *Metropolitan*.

In further distinction from the regulation at issue in *Metropolitan*, the Severance Pay Law does not mandate any minimum benefit. The Severance Pay Law applies only to large employers and to certain categories of employees. It permits a covered employer to make any severance pay contract whatsoever with covered employees or their bargaining representatives, arguably even for zero severance benefits. Indeed, the Severance Pay Law does not require uniform or minimum severance benefits even among covered employees in the same establishment.

[page 21] Rather than setting a "specific minimum protection" for individual workers, *Metropolitan*, 105 S.Ct. at 2397, quoting *Barrentine* v. *Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728, 739 (1981), the Severance Pay Law attempts to set the method by which covered employers and employees reach accommodation on the issue of severance pay during a plant closing. The method which the State favors—an express contract between employers and employees—is incompatible with the process of free collective bargaining chosen by Congress to accommodate the parties' interests on the same subject. The Severance Pay Law affects not only the result but the very process of bargaining, which this Court affirmed in *Metropolitan* is the foundation of federal labor law.

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## APPENDIX B

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

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No. 94

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WILLIAM RADOVICH,
*Petitioner*,
v.
NATIONAL FOOTBALL LEAGUE, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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# BRIEF FOR RESPONDENTS NATIONAL FOOTBALL LEAGUE, CHICAGO CARDINALS FOOTBALL CLUB, INC., NEW YORK GIANTS FOOTBALL CLUB, INC., CHICAGO BEARS FOOTBALL CLUB, INC., DETROIT FOOTBALL COMPANY AND LOS ANGELES RAMS FOOTBALL CLUB

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[page 56]

**(2) The Complaint Fails to Allege Injury to the Public**

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[page 59]

Plaintiff alleges only that by virtue of the adoption and enforcement of a uniform player's contract, and because of his own breach of it, he could not obtain engagement in the National Football League, or its "Division." Those allegations, if proved, would fail to establish a substantial injury or indeed any injury to the public. Nothing is alleged from which it can be inferred that restrictions upon the employment of Radovich decreased the quantity or quality of professional football games or caused any increase in prices to be charged to the public for admissions to games.

**(3) The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim for Relief Set Out in the Complaint**

Plaintiff claims that defendants by agreement contained in the uniform player's contract have refused to employ him in their professional football league. A refusal by [page 60] employers, whether singly or in concert, to employ any party to a labor dispute is declared by the Clayton and the Norris-LaGuardia Acts (29 U.S.C. § 52; 29 U.S.C. §§ 101-15) not to be considered or held to be in violation of any law of the United States. Hence, the complaint is fatally defective.

The allegations of the complaint reveal nothing more than a controversy between the employee and his employer and their association concerning terms and conditions of employment. Radovich alleges that he was under contract to the Detroit Lions; that he committed a breach of his contract; that he was placed on the ineligible list, and that by agreement, the ten member football clubs of

the National League refused to allow him to play in the National League, or its "Division".

* * * *

[page 61]

It is declared, in Section 6 of the Clayton Act:

> "The labor of a human being is not a commodity or article of commerce. . . ." (15 U.S.C. § 17)

That this section exempts restraints regarding employee services from the operation of the Sherman Act has been expressly held by this Court in the *Apex Hosiery* case, wherein the Court said:

> "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration of § 6 of the Clayton Act, 15 U.S.C. § 17, that '*the labor of a human being is not a commodity or article of commerce* . . . nor shall such [labor] organizations or the members thereof he held or construed to be illegal combinations or conspiracies in restraint of trade under the Anti-Trust laws,' it would seem plain *that restraints on the sale of the* [page 62] *employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.*" (emphasis supplied)
>
> *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 502-503

That this principle laid down in the *Apex Hosiery* case is equally applicable to agreements of employers

and employers' associations and to disputes between employers and an employee is clear from the language both of Section 20 of the Clayton Act and the history and provisions of the Norris-LaGuardia Act.

* * * *